Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE
UNITED STATES

MELVYN CARPENTER, *Petitioner*
V.

STATE OF CALIFORNIA, *Respondent*

On Petition for Writ of Certiorari to the Supreme Court of the State Of California

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Questions Presented for Review:

1) Whether the Last Reasoned Decision of the State Court Conflicts with *Brady v. Maryland* Concerning the Prosecution's Failure to Disclose Potentially Exculpatory Information

2).Whether Petitioner's Due Process Rights Under The XIVth Amendment Were Violated When The Court Refused To Sever The Charge Of Possession Of Child Pornography From The Allegations Of Child Sexual Abuse.

3) Whether Petitioner Was Denied His Fundamental Right To Trial By Jury When The Court Admitted The CSAAS Accommodation Syndrome Expert To Vouch For The Minor's Credibility And Whether CSAAS Is Admissible In A Prosecution's Case In Chief

Table of Contents

Questions Presented For Review: ..... *i*
Table Of Contents ..... *ii*
Table Of Authorities ..... *iii*
Petition For A Writ Of Certiorari To The Supreme Court Of The State Of California *1*
Jurisdiction *1*
Constitutional And Statutory Provisions Involved *2*
Statement Of The Case *4*
Reasons For Granting The Petition *5*
1. Petitioner Was Denied His Due Process Rights When The Prosecution Failed To Timely Disclose Relevant And Material Exculpatory Information And The Trial Court Refused Appropriate Relief *5*
2. The Petition Should Be Granted Because Petitioner's Due Process Rights Were Violated By The Trial Of The Possession Of The Child Pornography With Sexual Abuse Charges That Did Not Involve Pornography *13*
3. Whether Petitioner Was Denied His Fundamental Right To Trial By Jury When The Court Admitted The Child Sexual Abuse Accommodation Syndrome Expert To Vouch For The Minor's Credibility *17*
Conclusion *24*
Appendix *26*
Opinion Of The Court Of Appeal Of The State Of California Court Of Appeal, Fourth District, Division 3, California. *26*

TABLE OF AUTHORITIES

Cases

Ashcroft v. Free Speech Coalition, 535 U.S. 234,262, 122 S.Ct. 1389, 152 L.Ed 2d 403 (O'Connor, J,. Conc., 2002 10

Ashcroft v. Free Speech Coalition,535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed2d 403 (2002) 11

Banks v. Dretke 540 U.S. 668, 699,124 S.CT. 1256, 1271-1272 (2004), ... 4

Brady v. Maryland 373 U.S. 83, 83 S.Ct. 1194. 10 L.Ed.2d 215 (1963) ..... 4, passim

Brookhart v.. Janis, 384 U.S. 1, 3 [86 S.Ct 1245, 1246, 16 L.Ed.2d 314]. 9

Chapman v. State 18 P.3d 1164 (2001) 14

Daubert v. Merrill Dow Pharmaceuticals, Inc 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) 14

Estelle v. Mcguire (1991) 502 US 6 15

Frye v. United States 293 F. 1013 (D.C. Cir. 1923)14

Gonzales v. State 4 S.W. 3d 406 (1999) 15

Hadden v. Florida, Fla. Sup.Ct.No. 87,574 (1997. 14

In Re Rocco W. 706 A.2d 1302,1304 (R.I.1998) 6

Kyles V. Whitley 514 U.S. 419,438 115 S.Ct. 1555,131 L.Ed.2d 490 (1995). 7,9

Lewis v. State 754 N.E.2d 603,605 (Ind. Ct. App. 2001) 6

Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed.2d 956 (1968) 9

State v. Davis 64 Ohio App. 3d 334, 581 N.E.2d 604 (1989). 15

State v. Edelman 593 N.W.2d 419 (1999)..... 15

State v. Fortin 318 N.J. Super. 577, 724 A.2d 818 (1999)..... 15

State v. George 768 So.2d 748 (2000)..... 15
State v. Jones 71 Wash.App. 798, 863 P.2d. 85 (1993)..... 15
State v. Spears 209 Ariz. 125, 98 P.3d 560 (2004). 14
Stogner v. California 539 U.S. 607,650, 123 S.Ct. 2446,2450, 156 L.Ed.2d 544 (Kennedy, J.)..... 13
Tome v. United States 513 U.S. 150,166, 115 S.Ct. 696, 130 L.Ed2d 574 (1995)..... 16
United States v. Bighead 126 F.3rd 1329 (1997) 14
United States v. Bagley 473 U.S. 667,674, 105 S.Ct. 3374,87 L.Ed.2d 481..... 7
United States v. Bagley, 473 U.S. 667,667-78, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)..... 9
United States v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984)..... 9
United States v. Harvey 99 F.3rd 981(2nd Cir 1993)
Ashcroft v. Free Speech Coalition 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed2d 403 (2002)..... 11
United States v. Lane 474 U.S. 438, 449 , 106 S.Ct. 725, 88L.Ed2d 814.(1986)..... 12
Williams v. United States 168 U.S. 382, 390-391, 18 S,Ct. 92, 42 L.Ed. 509 (1897)..... 12

Statutes

18 U.S.C. § 1257...... 2
28 U.S.C.§1257..... 1
Evidence Code § 1101..... 11
Penal Code § 1054.1..... 7
Penal Code § 288, Subd. (A))..... 3
Penal Code § 311.11 Subd.(A).)..... 3
Penal Code § 667.61, Subds.(B),(C)(7), And (E)(5)..... 3

Other Authorities

Lyons, Scientific Support For Expert Testimony On Child Sexual Abuse Accommodation, In

Critical Issues In Child Sexual Abuse 107, 114-120 (J. Conte Ed. 2002 13
Seminar On Child Sexual Abuse, Ralph C. Underwager And Hollida Wakefield(Ipt Library Resources ,Www.Ipt (Oklahoma 1995), ... 14
Summit, Abuse Of The Child Sexual Abuse Accommodation Syndrome, In 1 J. Of Child Sexual Abuse 153, 156-163 (1992) 13

Constitutional Provisions

Amendment VI 2
Amendment XIV Sec.1 2

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

To the Honorable Chief Justice and Honorable Associate Justices of the Supreme Court.

Pursuant to United States Rules of Court Rule 13, Petitioner Melvyn Carpenter, a California incarcerated person, prays that a writ of Certiorari issue to the California Supreme Court because his conviction was obtained in violation of his due process rights under the Fourteenth Amendment when the prosecution failed to timely disclose exculpatory information in violation of *Brady v. Maryland*, the trial court failed to safeguard his discovery rights, the trial court eviscerated his right to trial by jury by refusing to sever certain counts, and further allowed unreliable scientific testimony.

OPINIONS BELOW

The unpublished opinion of the Court of Appeal is reproduced in the Appendix.

JURISDICTION

The unpublished opinion of the California Court of Appeal was filed October 4, 2004. The petition for review by the California Supreme Court was denied January 19, 2005. This Court has jurisdiction under 28 U.S.C.§1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV sec.1

"nor shall any State deprive any person of life, liberty, or property, without due process of law"

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . .to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense

18 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United

States.

Statement of the Case

Petitioner was convicted after a jury trial of multiple felony counts of criminal sexual conduct with children and of misdemeanor possession of child pornography. Before trial he unsuccessfully moved the court on due process grounds to sever the child pornography possession charge. He also unsuccessfully objected to the prosecution's use of CSAAS (child sexual abuse accommodation syndrome) evidence to bolster the prosecution's case. Further, during the course of the trial, the defense learned that Kaitlyn G., one of the children, who the defense had been told through discovery had first disclosed the alleged molestation to her mother, had instead first disclosed to Judy West, her baby sitter. Petitioner was totally dependant upon documentary discovery from the prosecution to prepare his cross-examination and the majority of his defense since none of the prosecution witnesses would talk to his attorneys. Petitioner moved for a mistrial twice after learning about the prosecution's failure to disclose the information. The motions were denied.

Petitioner was convicted of 9 counts of lewd and lascivious conduct with a child under 14 (Penal Code § 288, subd. (a)) and one count of possession of child pornography (Penal Code § 311.11 subd.(a).) with enhancements for more than one victim. (Penal Code § 667.61, subds.(b),(c)(7), and (e)

(5).) The jury did not reach a verdict on 7 counts of forcible lewd act on Kristin G. He was sentenced to a total of 45 years to life.

REASONS FOR GRANTING THE PETITION

1. Petitioner Was Denied His Due Process Rights When The Prosecution Failed To Timely Disclose Relevant And Material Exculpatory Information And The Trial Court Refused Appropriate Relief

The prosecution's failure in its duty to disclose relevant evidence in Petitioner's case violated the Fourteenth Amendment guarantee of due process of law.

Last term this Court decided *Banks v. Dretke* 540 U.S. 668, 699,124 S.CT. 1256, 1271-1272, 157 L.Ed2d 1166(2004), holding that when police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight. In *Banks* the prosecution failed to disclose that one its main witnesses was a police informant. This Court found that the State's suppression of that fact was material under *Brady* (*Brady v. Maryland* 373 U.S.83, 83 S.Ct. 1154, 10 L.Ed2d. 215(1963)) because the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict because the paid informant had provided a critical role in the scenario that led to Banks's indictment. (Id at

p. 1262.) So serious did this Court find the *Brady* violation that it decided in Petitioner's favor even after Banks procedurally defaulted by failing to raise the issue in lower court proceedings. (Id at 701.)

Here, Petitioner has consistently and vociferously and persistently raised the *Brady* violation, at all levels of court proceedings. He did so in the trial court, on direct appeal, and in his petition for review to the California Supreme Court. Although it cannot be said that the little girl, her baby-sitter, or her mother are police informants, it was Kaitlyn's statement to her babysitter and then to her mother that was responsible for the arrest and prosecution of Petitioner. If her statement was untrue in any material part---and in a case of this kind, the timing, nature, content and interactions surrounding the first disclosure cannot be understated--that untruth or contradiction as to first disclosure could shed light on the falsity of the accusation. The jury was entitled to know that this little girl had changed her story. Because petitioner was not told this in time to locate and interview this witness, who, not being a family member or other interested party might have been available for interview as well as by subpoena, he was denied a crucial opportunity for cross-examination and confrontation of the witnesses as well as to call the baby-sitter in his defense. The prosecution relied upon a expert in the so-called Child Sexual Abuse Accommodation Syndrome (CSAAS)to

strengthen its otherwise weak case. Petitioner separately urges this Court to decide whether such quasi-scientific evidence was properly accepted; for the purposes of evaluating the materiality of the prosecution's failure to disclose he notes that the CSAAS expert testified that first disclosure was of critical importance in evaluating a child's credibility. Telling and retelling the story leads to changes or discrepancies in the child's story, sometimes because of the confirmatory bias of the questioner. (Trial transcript at pp 1228-1232.) (Other state courts have commented upon this problem: see e.g. *Lewis v. State* 754 N.E.2d 603,605 (Ind. Ct. App. 2001) [passage of time between initial disclosure and recorded statement presented opportunity for coaching] and *In Re Rocco W.* 706 A.2d 1302,1304 (R.I.1998) [significant lapses of time, ample opportunity for reflection and deliberation, and numerous previous disclosures suggested that later hearsay statements were neither spontaneous nor made at the child's first safe opportunity to disclose.] Petitioner here was denied all opportunity to attack Kaitlyn's credibility; yet, the jury was unable to come to a decision as to the nine charges involving her sister.

In petitioner's case, the prosecution had the evidence, well in advance of trial, that would have contradicted the prior statement of one of the children, Caitlin, about her first disclosure of the abuse. Petitioner had been give discovery that showed only that the first person Kaitlyn told

was her mother, although the prosecution had known this statement was untrue through statements made to its investigator by at least two witnesses before trial. When the mother testified at trial petitioner learned for the first time that the child had told her baby sitter first.

The enormity of the prosecution's failure to disclose this evidence cannot be overstated. This was, as defendant argued at the motion for mistrial, the prior statement of a key prosecution witness. Trial transcript at page 1264.) This evidence impeaches her other statements that she told her mother first—and thus is exculpatory under *Brady v. Maryland* 373 U.S. 83, 83 S.Ct. 1194. 10 L.Ed.2d 215 (1963). Second, the prosecution's failure to disclose the prior statement of a witness violates California law, a law designed to protect the XIVth Amendment right to due process and the VIth Amendment right to confront witnesses and to the compulsory attendance of witnesses since it prevented timely subpoena of Mrs. West, the baby sitter. Penal Code § 1054.1. Mrs. West's testimony would have been important to allow petitioner to effectively cross-examine the mother and the little girl, both as to *when* the child told her baby sitter, and as to *what* she revealed. The late disclosure therefore violated the XIVth Amendment right to due process of law. (*United States v. Bagley* 473 U.S. 667,674, 105 S.Ct. 3374,87 L.Ed.2d 481.) The prosecution's excuse was that they had tried and failed to

locate Judy West, whom they considered a prosecution witness. (Trial Transcript at p. 1267). However, since its investigators knew about this evidence, the prosecution is not excused from this duty to disclose. (*Kyles v. Whitley* 514 U.S. 419,438 115 S.Ct. 1555,131 L.Ed.2d 490 (1995).)

Further, the late disclosure prevented petitioner from securing the attendance of the witness at trial. Petitioner proved that given timely disclosure they could have produced the witness; the defense investigator had located her, but not in time for trial. (Trial transcript at pp. 1327-1331.)

By failing to disclose the relevant statement of a witness, the prosecution clearly violated petitioner's rights to confront witnesses. *Brady v. Maryland*, supra. Nor does it matter that the non-disclosed evidence would have served only to impeach the little girl and her mother, who were both critical prosecution witnesses. "This Court has rejected any such distinction between impeachment evidence and exculpatory evidence. In *Giglio v. United States, supra*, the Government failed to disclose impeachment evidence similar to the evidence at issue in the present case, that is, a promise made to the key Government witness that he would not be prosecuted if he testified for the Government. This Court said:

"When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within th [e] general rule [of

Brady]. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict....' A finding of materiality of the evidence is required under *Brady*.... A new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury....' " 405 U.S., at 154, 92 S.Ct., at 766 (citations omitted).

Thus, the Court of Appeals' holding is inconsistent with our precedents.

Moreover, the court's reliance on *Davis v. Alaska* for its "automatic reversal" rule is misplaced. In *Davis*, the defense sought to cross-examine a crucial prosecution witness concerning his probationary status as a juvenile delinquent. The defense intended by this cross-examination to show that the witness might have made a faulty identification of the defendant in order to shift suspicion away from himself or because he feared that his probationary status would be jeopardized if he did not satisfactorily assist the police and prosecutor in obtaining a conviction. Pursuant to a state rule of procedure and a state statute making juvenile adjudications inadmissible, the trial judge prohibited the defense from conducting the cross-examination. This Court reversed the defendant's conviction, ruling that the direct restriction on the scope of cross-examination denied the defendant "the right of effective cross-examination which ' "would be

constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart v. Janis,* 384 U.S. 1, 3" ' [86 S.Ct. 1245, 1246, 16 L.Ed.2d 314]." 415 U.S., at 318, 94 S.Ct., at 1111 (quoting *Smith v. Illinois,* 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed.2d 956 (1968)). See also *United States v. Cronic,* 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984) (*United States v. Bagley,* 473 U.S. 667,667-78, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).)

Thus, the failure to disclose the evidence before trial materially affected the outcome of the trial.

"*Bagley* 's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Bagley,* 473 U.S., at 678, 105 S.Ct., at 3381 (*Kyles v. Whitley,* 514 U.S. at 434, 115 S.Ct at 1566.)

Because the opinion of the Court of Appeal (the Supreme Court having denied review) is at odds with this Court's jurisprudence on this issue, this Court should grant the petition.

2. The Petition Should Be Granted Because Petitioner's Due Process Rights Were Violated By the Trial of The Possession of the Child Pornography with Sexual Abuse Charges That Did Not Involve Pornography

Petitioner was convicted after a jury trial of multiple felony counts of criminal sexual conduct with children and of misdemeanor possession of child pornography. Before trial, he moved the court to sever the misdemeanor Penal Code § 311.11 count from the other charges. This Court has noted that there is a lack of causal connection between virtual child pornography and actual child abuse. (*Ashcroft v. Free Speech Coalition*, 535 U.S. 234,262, 122 S.Ct. 1389, 152 L.Ed 2d 403 (O'Connor, J,. conc., 2002). However, the only purpose for the joinder of the possession of child pornography charge with the sexual assault charges was to show petitioner's propensity to commit lewd acts against children, as permitted by the California Evidence Code.

Since its purpose was concededly to inflame the jury and bolster a weak child sexual abuse case, the improper joinder implicates petitioner's *federal* due process rights, as he argued on appeal and in his petition for review in the California Supreme Court, that the joinder was improper because the charges were not of the same class and was prejudicially inflammatory where as here the defendant is charged with multiple

sexual acts on a child. (Opening brief in State appeal at pp. 42–51).

The evidence submitted in support of this charged was 2500 computer images of naked or sexually posed girls apparently under the age of 18 which was more prejudicial than probative and should have been excluded because of the prejudicial effect of the sheer volume of images. Where the evidence of petitioner's guilt absent the computer images is not overwhelming, the error is not harmless. Even the use to which the prosecution put the computer images supports petitioner's contention that the other evidence against him is not overwhelming because the prosecution relied on this evidence to prove petitioner's sexual intent in touching the girls--- an essential element of its case. (Trial transcript at pp. 1034-1035, 1089-1090.)

The Court of Appeal ruled that the images other than those relied upon to prove the violation of Penal Code § 311.11 were admissible to prove petitioner's propensity to commit the crimes, but only to show his purpose and intent and therefore were properly admitted under Evidence Code § 1101. (Opinion pages 8-9.) It discounted the prejudicial effect of the number of images because of their small size in favor of the probative value of 2500 images to show petitioner's interest in young girls. (Opinion at p. 9.) However, the opinion ignores the fact that the prosecution blew up 29 pages of images collected from petitioner's computer

and misses the point: the prosecution ultimately relied on only 8 of the images to support the possession of child pornography charge. (Trial transcript at pp. 1663, 1164, 1168.) It could not prove that the remainder of the images were any more than legal child erotica *Ashcroft v. Free Speech Coalition*,535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed2d 403 (2002)Thus the prosecution not only relied on evidence of other crimes, albeit charged crime, it relied on evidence of innocent conduct to show petitioner's intent to commit a crime. Evidence of pornography of any kind is highly inflammatory and prejudicial (*United States v. Harvey* (2d Cir 1993) 99 F.3rd 981.) Whether the jury was so instructed or not, the large amount of inflammatory evidence would lead the jury to infer that petitioner had a propensity to engage in sexual activity involving children..

The issue before this court is, therefore, not merely whether the court improperly denied the motion to sever, but also whether petitioner was nevertheless denied a fair trial by the joinder of the charges, *United States v. Lane* 474 U.S. 438, 449 , 106 S.Ct. 725, 88L.Ed2d 814.(1986) (reversal required if joinder actually resulted in gross unfairness amounting to a denial of due process) and the introduction of 2400 images more than those reasonably necessary to prove the charged offense---where the only reason for joining the counts was to show petitioner's evil intent. Petitioner submits that the admission of the child erotica violated his due process rights

Since 1897, this Court has recognized that consolidation of charges was proper "when they were of the same kind, provable by the same kind of evidence and could be tried together without embarrassing the accused in making his defense" However, the court recognized that consolidation might be improper if it prejudiced the defense. (*Williams v. United States* 168 U.S. 382, 390-391, 18 S.Ct. 92, 42 L.Ed. 509 (1897).) Here, of course, the charges were not of the same kind nor were they provable by the same kind of evidence, and petitioner contends he was very much embarrass"ed in making his defense.

3. Whether Petitioner Was Denied His Fundamental Right To Trial By Jury When The Court Admitted The Child SexualAccommodation Syndrome Expert To Vouch For The Minor's Credibility

With charges of sexual misconduct involving children routinely being prosecuted with the zeal associated with a medieval witch-hunt and with the accused being described as engaging in increasingly bizarre conduct it is surprising that prosecutors would ever feel that they had to bolster the credibility of their witnesses, especially that of the victims. However, in petitioner's case the prosecution bolstered its case in chief with Child Abuse Accommodation Syndrome.

Child sexual abuse accommodation syndrome known popularly as CSAAS was invented by Roland C. Summit. It purports to be an instrument for clinically testing whether a child has been sexually abused. In petitioner's case it was introduced, over his

objection on general constitutional grounds to 'destroy common myths about children reporting late, returning to the abuser, and common characteristics of that syndrome." (Reporter's Transcript of State criminal trial at pp. 32-33.)

Neither this Court nor the California Supreme Court have never expressly decided what, if any prosecutorial use, may be made of the controversial Child Sexual Abuse Accommodation Syndrome. However, the dissenting opinion in *Stogner v. California* 539 U.S. 607,650, 123 S.Ct. 2446,2450, 156 L.Ed.2d 544 (Kennedy, J.) cites with apparent approval two empirical studies: Summit, Abuse of the Child Sexual Abuse Accommodation Syndrome, in 1 J. of Child Sexual Abuse 153, 156-163 (1992) and the apparently contradictory Lyons, Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation, in Critical Issues in Child Sexual Abuse 107, 114-120 (J. Conte ed. 2002.)

CSAAS, however, is at the center of a controversy whether it can be used to distinguish between abused and nonabused children and it has been disapproved in many state courts, a fact recognized by the Court of Appeal. (Opinion at page 12), including Florida (*Hadden v. Florida*, Fla. Sup.Ct.No. 87,574 (1997). In their Seminar on Child Sexual Abuse, Ralph C. Underwager and Hollida Wakefield(iPT Library Resources ,www.ipt (Oklahoma 1995), point out that CSAAS is not supported by scientific

research. (iPT Library Resources, www.ipt forensics.com/library/oklahoma8.htm.) Summit himself has acknowledged that the CSAAS is a clinical opinion, not a scientific instrument. In the same seminar materials, the authors explain that the vice of the application of CSAAS to children's statements "means that nothing they say can count against the belief that abuse happens. Once an allegation hits a professional who believes in the validity of the CSAAS concept, nothing can falsify it. (Id.)

The Circuits and the states are divided on this issue. In the Ninth Circuit, use of CSAAS was held to require reversal of a federal conviction on grounds that CSAAS was not reliable under *Daubert v. Merrill Dow Pharmaceuticals, Inc 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (United States v, Bighead 126 F.3rd 1329 (1997).* In 2004 Arizona held that CSAAS evidence did not need to pass *Frye (Frye v. United States* 293 F. 1013 (D.C. Cir. 1923) and reversed a conviction where the defendant was not permitted to offer the evidence. (*State v. Spears* 209 Ariz. 125, 98 P.3d 560 (2004).) Wyoming limits the evidence of the syndrome, allowing "qualified experts to use it for the sole purpose of explaining a victim's specific behavior which might be incorrectly construed as inconsistent with an abuse victim or to rebut an attack on the victim's credibility". (*Chapman v. State* 18 P.3d 1164 (2001). Louisiana has found the evidence unreliable under *Daubert*. (*State v.*

George 768 So.2d 748 (2000); Texas permits it. (*Gonzales v. State* 4 S.W. 3d 406 (1999), as do South Dakota (*State v. Edelman* 593 N.W.2d 419 (1999), New Jersey [but only to explain why victims may recant but not to prove the abuse occurred]. (*State v. Fortin* 318 N.J. Super. 577, 724 A.2d 818 (1999)), and Washington (*State v. Jones* 71 Wash.App. 798, 863 P.2d. 85 (1993)). Ohio does not always allow it to prove sexual abuse or (as in Petitioner's case) to bolster the testimony of a victim/witness. (See *State v. Davis* 64 Ohio App. 3d 334, 581 N.E.2d 604 (1989).)

Petitioner's case presents an opportunity for this court to determine whether CSAAS should or should be accepted as scientific evidence of sexual abuse or whether it is so inherently violative of petitioner's rights to due process and at the same time so inherently unreliable that its use should not be allowed in the prosecution's case in chief..

In *Estelle v. McGuire* (1991) 502 US 6 this Court ruled that battered child syndrome evidence did not violate due process where the defense did not challenge the prior injuries and the evidence of prior injuries was introduced to prove an element of the prosecution's case – that the child was intentionally abused.

CSAAS evidence is not the same type of evidence; it is evidence that a child behaved or failed to behave in ways that some experts have determined to be consistent with having been sexually abused.

Because of the risk that jurors would therefore conclude that the child had been abused in the absence even of other proof , this court should re-examine its tacit acceptance of CSAAS, decline to extend *Estelle v. McGuire* and exclude this highly prejudicial, but doubtfully probative evidence. The use of CSAAS evidence presents an unacceptable risk of false conviction and violates a defendant's right to due process.

In petitioner's case the CSAAS evidence clearly invaded the province of the jury; as he said in his opening brief, "in allowing Dr. Thomas's CSAAS testimony to be positioned as part of the prosecution's case in chief, and allowing the testimony to exceed the parameters outlined by previous case law, the minors' credibility was improperly vouched for, the jury's function to determine credibility was usurped, and petitioner was denied his right to a fair trial and a trial by jury, both of which were constitutionally guaranteed." (Petitioner's opening brief in State appeal at p. 75.) The error was prejudicial because in its absence the jury that had failed to convict petitioner of nine counts relating to Kristin G. would likely have rejected all of her testimony.

In *Tome v. United States,* this Court held that while "courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers...it cannot alter evidentiary rules merely because litigants might prefer different rules in a

particular class of cases." (*Tome v. United States* 513 U.S. 150,166, 115 S.Ct. 696, 130 L.Ed2d 574 (1995).)

The petition should be granted to resolve the conflicts among the several states and circuits and to determine to what extent and in what manner CSAAS testimony should be admitted in a criminal trial. Petitioner submits that it should be rejected as unreliable, untrustworthy, and presenting an unacceptable threat to due process, especially when introduced for any purpose other than to rehabilitate the testimony of a witness.

CONCLUSION

Petitioner was convicted in violation of his Fourteenth Amendment rights to due process of law. He was tried on improperly joined charges, denied his opportunity to properly prepare his defense by the prosecution's late disclosure of exculpatory and impeaching evidence, and the prosecution bolstered the credibility of its witnesses with unreliable scientific evidence. Therefore, he requests that this Court issue a writ of certiorari to the California Supreme Court, that his conviction may be reversed.

Dated: April 15, 2005

Respectfully submitted

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APPENDIX

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA COURT OF APPEAL, FOURTH DISTRICT, DIVISION 3, CALIFORNIA.

The PEOPLE, Plaintiff and Respondent,

v.

Melvyn CARPENTER, Defendant and Appellant.

No. G031354.

(Super.Ct.No. 01HF0262).

Oct. 14, 2004.

As Modified on Denial of Rehearing Nov. 15, 2004.

Review Denied Jan. 19, 2005.

Appeal from a judgment of the Superior Court of Orange County, Everett W. Dickey, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)
Renewed motion for leave to file a late reply brief.
Judgment affirmed. Motion granted.
The Chase Law Group, Eric A. Chase and Alison Minet Adams for Defendant and Appellant.
Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Janelle Boustany and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

RYLAARSDAM, J.

***1** A jury convicted defendant Melvyn Carpenter of nine counts of committing a lewd act with a child under the age of 14 years and one count of possessing child pornography. (Pen.Code, §§ 288, subd. (a), 311.11; all further references are to the Penal Code unless otherwise noted.) The jury also found true allegations that the lewd acts involved more than one victim. (§ 667.61, subds.(b), (c)(7), & (e)(5).)

Defendant raises the following issues on appeal: (1)

the court erroneously denied a motion to sever the child pornography count from the remaining counts; (2) the photographs extracted from defendant's computer were improperly admitted to show his intent in committing the lewd acts; (3) the prosecutor failed to disclose material information relating to a potential witness, and the court, in turn, erroneously denied defendant's motion for a mistrial; (4) the court erred by admitting evidence of the Child Sexual Abuse Accommodation Syndrome; (5) the prosecutor committed misconduct during closing argument; (6) there was insufficient evidence to support defendant's convictions on counts 1 and 2 (lewd acts involving Kristin G.) and count 19 (possession of child pornography); and (7) the cumulative errors require reversal. We disagree with each of these contentions and affirm the judgment. We further grant defendant's renewed motion to file a reply brief.

FACTS

Counts 1 through 11

Defendant lived on the same street as his victims, Kristin and Kaitlyn G., and Taryn P., who, at the time of the complained-of events, were all grade-school age. The girls frequently went over to defendant's house to visit him. Now and then he bought them presents; he also paid them to clean his house. Defendant was an avid runner who often wore running shorts, and occasionally he would sit on the floor inside his house and perform leg stretches with the girls.

In counts 1 and 2, defendant was charged with and convicted of committing two lewd acts (§ 288, subd. (a)) with Kristin G. The jury did not reach a verdict as to counts 3 through 11, also relating to Kristin, which charged defendant with an additional nine lewd acts involving the use of force, violence, duress, menace or fear of immediate bodily injury (§

288, subd. (b)).
Kristin and her friend Katie H. performed leg stretches with defendant. According to Katie, defendant taught them to press the bottoms of their feet against the inside of his ankles and pull on his arms to stretch his legs. He would do the same with them to stretch their legs. Both girls believed that at least one time they saw defendant's penis sticking out of his shorts while they were stretching with him.
Once when Kristin wanted to earn extra money, defendant suggested that she give him massages. He massaged her first to show her how to do it. In the process, he touched her vaginal area; Kristin testified this happened about four times.
Kristin further testified that defendant began to have intercourse with her on a regular basis when she was in the fourth grade. She also claimed he once held a knife to her and threatened to slit her breasts and other parts of her body and then put his penis in her mouth. Another time, he threatened her with a knife and then licked her nude body. On a different occasion, defendant blindfolded her and then tied her arms and legs before he raped her; Kristin thought she heard him take a photograph of her as well. Once Kristin set off an alarm at defendant's house while they were having intercourse. He later cut the top of her hand with the blade from a blender because the police had responded to the alarm. A medical examination of Kristin did not reveal any physical findings to support her allegations of multiple forced vaginal penetrations.
***2** Kristin's mother contacted the police after learning defendant had inappropriately touched Kristin's younger sister Kaitlyn. The police interviewed both girls, but Kristin was reluctant to disclose anything. Eventually, Kristin opened up to

the mother of a friend, at first only revealing bits and pieces of what had occurred, but gradually she revealed more. Kristin did not disclose any of the incidents involving the use of force, violence, or threats during her first Child Abuse Services Team interview. Instead, she denied that defendant used weapons to coerce her or that he tied her up.

The prosecutor presented expert witness testimony about the Child Sexual Abuse Accommodation Syndrome (CSAAS). The expert testified that CSAAS is used to explain the different ways children respond to being sexually abused by someone they know and trust. There are five stages, described as secrecy, helplessness, entrapment and accommodation, disclosure, and recantation. According to the prosecution's expert, when a child does reveal the abuse, it is often delayed. But experts for both parties testified CSAAS is not a diagnostic tool and is not meant to establish the credibility of delayed disclosures.

Defendant denied touching Kristin in a sexual or otherwise inappropriate manner or exposing himself to her or any of the other girls while stretching. He admitted that Kristin gave him at least two massages, but denied ever massaging her.

Count 12

In count 12, defendant was charged with and convicted of committing one lewd act with Taryn. She testified defendant would ask her if she wanted to stretch with him and they would sit on the floor facing each other with their legs spread apart. Once when they were stretching, Taryn thought she saw defendant's penis laying outside of his shorts. Another time, defendant stuck his hand in her shorts and touched her underwear, commenting, "what cute underwear you have." Defendant admitted commenting to Taryn that she had cute underwear, but denied ever touching her

underwear.

Counts 13 through 18

In counts 13 through 18, defendant was charged with and convicted of committing six lewd acts with Kaitlyn. At trial, Kaitlyn testified she used to go over to defendant's house nearly everyday after school. Around September 1999, defendant treated a corn on her foot over a period of time. He had Kaitlyn lie down on his bed while he put medicine on the corn. The first time he did this, defendant asked Kaitlyn if she was ticklish. He then tickled different parts of her body, including her "private part." In doing so, he pulled her shorts and underwear down to her thighs and put his finger in the area where she "go[es] pee." Kaitlyn, who was eight years old at the time, testified that it felt weird. The tickling incidents took place until the corn healed. Defendant told Kaitlyn not to tell anyone because they "were buddies and other people wouldn't understand."

***3** Kaitlyn further testified that defendant also tried laying on top of her to see if she could hold his weight; he would lay his stomach on her and roll back and forth. She thought it was probably true that his private part touched her stomach and said it felt "[s]quishy." When Kaitlyn stretched with defendant she would sometimes hold his legs. Eventually, Kaitlyn told her babysitter, Judy West, about the tickling. West had Kaitlyn tell her mother, who then reported it to the police.

Defendant admitted he tickled Kaitlyn's arms and belly while treating her corn, but he denied ever pulling down her pants or touching her private parts.

Count 19

In count 19, defendant was charged with and convicted of possessing child pornography (§ 311.11). The police seized defendant's computer and

recovered approximately 2,500 images of children who were mostly nude females under the age of 18. The images had been downloaded from a web site called "littlevirgins.com." Defendant had paid a monthly fee to access images on the web site. The web site had a legal disclaimer which implied the images displayed did not violate federal law and also indicated the girls shown were between the ages of 7 and 17. The vast majority of the images which had been downloaded were of nude girls standing up. But there were also some images of young girls laying down with their legs spread open or otherwise posed in a sexually explicit manner.
Maria Bennett, an intelligence research specialist for the FBI, testified that she identified eight of the images from magazines published before 1988, the year computerized "morphing" technology was developed. She described morphing as "[t]he ability to create a computer generated image which could depict a child." Because the eight identified images were generated before that technology existed, Bennett established that the children depicted in the images were real, and not computer generated. Six of the images could be traced to a 1977 publication called Nudist Angels. The seventh image was traced to a 1972 publication called Nudist Moppets, and the eighth image was traced to a 1976 publication called Moppets and Teens.
Defendant testified the littlevirgins.com web site popped up one time while he was visiting an adult pornography web site. He was aware the web site contained mainly pictures of young nude girls, and he joined it out of curiosity. He also admitted to downloading the images recovered from his computer.

DISCUSSION

Motion to Sever

Before trial, defendant moved to sever the child

pornography count from the other 18 lewd act counts. The court denied the motion after finding the computer images of young, nude girls were relevant to show defendant's intent in committing the lewd acts. The court further found the images were "[no] more inflammatory than the child molestation charges themselves...."

Defendant argues the court erred in denying the motion and thereby violated his due process right to a fair trial. To support his argument, he contends the misdemeanor offense of possessing child pornography (§ 311.11) is in a different class of crimes than child molestation (§ 288) and that the evidence relating to the offenses would not have been cross-admissible had they been separately tried. We disagree.

***4** "Denial of a severance motion may be an abuse of discretion if the evidence related to the joined counts is not cross-admissible; if evidence relevant to some but not all of the counts is highly inflammatory; [or] if a relatively weak case has been joined with a strong case so as to suggest a possible 'spillover' effect that might affect the outcome...." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1283, 18 Cal.Rptr.2d 796, 850 P.2d 1.)

Here, the court did not abuse its discretion in failing to sever count 19. As the court stated, evidence of the computer images, while highly inflammatory, were not more inflammatory than the lewd acts alleged against defendant. We further conclude the images would have been cross-admissible under Evidence Code section 1101, subdivision (b) in a separate trial on the lewd acts counts to show defendant's specific intent to fulfill his own sexual desires by touching the victims or having them touch him. (*People v. Ochoa* (1998) 19 Cal.4th 353, 409-410, 79 Cal.Rptr.2d 408, 966 P.2d 442; *People v. Memro* (1995) 11 Cal.4th 786, 851, 47 Cal.Rptr.2d 219,

905 P.2d 1305.) Thus, the court's denial of the motion to sever the charges did not result in any gross unfairness to defendant.

Admissibility of the Computer Images

In a pretrial hearing, the prosecutor moved to admit evidence of the images found on defendant's computer to show his intent in committing the lewd acts pursuant to Evidence Code sections 1101, subdivision (b) and 1108. The court reasoned that the evidence was admissible under both Evidence Code sections 1101, subdivision (b) and 1108 to show specific intent because defendant was claiming that any physical contact he had with the children was nonsexual. The court further concluded the relevance of the evidence outweighed any potential for undue prejudice under Evidence Code section 352.

On appeal, defendant contends the prosecutor failed to establish as a preliminary fact that possession of child pornography demonstrates a propensity to commit child molestation. Thus, he argues, "the court's implied finding that the tendered evidence was sufficiently similar to the charged offenses to warrant its admission was based on speculation rather than fact...." He further asserts that because only eight of the nearly 2,500 images were identified by an expert as being photographs of actual children, as opposed to computer-generated images, the testimony authenticating the images was misleading, confusing, and unduly time consuming. Defendant admitted touching the girls while stretching with them. He also admitted tickling Kaitlyn and having Kristin give him massages. But he claimed the touching was not sexually motivated. Thus, the computer images were relevant to show his intent under section 288, subdivision (a), and, therefore, the images were properly admitted under Evidence Code section 1101, subdivision (b). (*People*

v. Memro, supra, 11 Cal.4th at pp. 864-865, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) As the court reasoned in *Memro,* while the content of some of the images "would undoubtedly be disturbing to most people," it cannot be said that such material "was substantially more prejudicial than probative, for its value in establishing defendant's intent to violate section 288 was substantial." (*Id.* at p. 865, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) We further note the court instructed the jury in accordance with CALJIC No. 2.50 that images other than those relied on to support the child pornography charge in count 19 could only be considered for the limited purpose of determining defendant's intent and motive.

***5** We also disagree with defendant's contention that the sheer number of the images, most of which were described as being thumbnail-sized, was prejudicial. The roughly 2,500 images recovered from his computer were indicative of the extent of his interest in nude young girls, and, under the circumstances, not unduly prejudicial. Furthermore, because the jury was not instructed that it could consider the images as evidence of defendant's propensity to commit lewd acts, we need not address the admissibility of the images under Evidence Code section 1108.

Belated Disclosure of a Potential Witness

Defendant contends the prosecution failed to timely disclose material information in violation of *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215]. He further argues the court erred in denying his motion for a mistrial based on the belated disclosure. We are not persuaded.

Eight months before trial, Kaitlyn revealed to Investigator Welch that she first told Judy West, her live-in babysitter, about defendant tickling her private parts. Kaitlyn's mother was not able to provide Welch with much information about West,

only that she had moved to Texas with her adult son, Christopher. Welch attempted to identify West and her son through driver's license records in Texas, but got back too many matches in response to his inquiry. The prosecutor apparently did not inform the defense team that Kaitlyn first disclosed the tickling incidents to West until shortly before trial, thus preventing the defense from locating and subpoenaing West as a witness for trial.

In *Brady v. Maryland, supra,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Id.* at p. 87.) Subsequent cases determined that such an error requires reversal whether the undisclosed evidence had been requested by the defense or not unless the defendant, in the absence of such evidence, nevertheless " 'received a fair trial, understood as a trial resulting in a verdict worthy of confidence.' [Citation.]" (*In re Brown* (1998) 17 Cal.4th 873, 886, 72 Cal.Rptr.2d 698, 952 P.2d 715.) In other words, reversal is required if " 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' [Citation.]" (*Id.* at p. 887, 72 Cal.Rptr.2d 698, 952 P.2d 715.)

Shortly before trial, a private investigator for the defense was able to identify social security numbers for both West and her son, which she then used to trace the pair to an address and phone number in Texas. After trial commenced, the private investigator called the number and left a message. Someone named Anthony West returned the call; he said Judy West was his mother and that she had recently moved. He agreed to pass on a message

asking her to call the private investigator, but no further calls had been received.

6 When defendant later moved for a mistrial based on the prosecutor's failure to timely disclose the information relating to West, the prosecutor pointed out that the defense team was previously aware West and her son had lived with Kaitlyn's family and the belated disclosure related only to Kaitlyn's statement that she first disclosed the molestation to West. The prosecutor further argued there was nothing to indicate West's testimony would have been exculpatory. Defense counsel asserted West would have impeached Kaitlyn's credibility, but offered no evidence to support such speculation. Consequently, the court denied the motion for mistrial stating, "There is simply no reason for either side to believe that the testimony of [West] or her son would be exculpatory as to the defendant."

On this record, we conclude defendant has failed to show West would have contradicted Kaitlyn's testimony in any manner or otherwise offered evidence which would have been favorable to the defense. Thus, there is no evidence to support defendant's claim the verdict was undermined by the belated discovery of the fact Kaitlyn initially disclosed her allegations against defendant to West.

Admissibility of Evidence of the Child Sexual Abuse Accommodation Syndrome

Defendant contends the admission of evidence regarding the Child Sexual Abuse Accommodation Syndrome (CSAAS) violated his right to a fair trial by "invad [ing] the jury's credibility-determining province...." He further urges that we follow other states which have outright banned such evidence in child molestation cases.

Under California law, expert testimony about CSAAS is admissible "for the limited purpose of disabusing the jury of misconceptions as to how

child victims react to abuse." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 392, 249 Cal.Rptr. 886, fn. omitted.) Specifically, "where a child delays a significant period of time before reporting an incident or pattern of abuse, an expert could testify that such delayed reporting is not inconsistent with the secretive environment often created by an abuser who occupies a position of trust." (*Id.* at p. 394, 249 Cal.Rptr. 886.) When such testimony is admitted, the court must instruct the jury "that the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true." (*Ibid.*) It must further be explained "that CSAAS research approaches the issue from a perspective opposite to that of the jury. CSAAS assumes a molestation has occurred and seeks to describe and explain common reactions of children to the experience. [Citation.] The evidence is admissible solely for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested." (*Ibid.*, emphasis omitted.)

Here, the prosecution's expert testified in general about CSAAS and how children who are sexually abused by someone they trust frequently delay disclosing the abuse. The court properly instructed the jury on the limited purpose of the CSAAS evidence. And the record does not support defendant's contention that he was prejudiced by the fact that the evidence was offered during the prosecution's case-in-chief or because the jury instruction was given at the end of trial rather than on the heels of the expert's testimony. To the contrary, it is evident from the jurors' inability to reach a verdict on counts 3 through 11 that they did not misapply the CSAAS evidence or otherwise abandon their responsibility to determine the credibility of the victims, and in particular Kristin's

credibility.

***7** While the California Supreme Court has not directly ruled on the admissibility of CSAAS evidence, it has held that similar evidence, i.e., the rape trauma syndrome, is admissible. (*People v. Bledsoe* (1984) 36 Cal.3d 236, 247-248, 203 Cal.Rptr. 450, 681 P.2d 291; see also *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301, 283 Cal.Rptr. 382, 812 P.2d 563 [evidence regarding parents' delayed reporting of child molestation].) In light of such authority, we decline defendant's invitation to join with other states in excluding CSAAS evidence all together.

Prosecutorial Misconduct

Defendant argues that the prosecutor committed misconduct during closing argument by referring to facts outside of the record, by suggesting additional charges could have been filed, and by repeatedly referring to uncharged crimes evidence. We disagree.

"Under the federal Constitution, to be reversible, a prosecutor's improper comments must " 'so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process.' " [Citations.] " 'But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citations.]' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000, 108 Cal.Rptr.2d 291, 25 P.3d 519.) To preserve such a claim, a timely objection and request to admonish the jury must be made. (*People v. Silva* (2001) 25 Cal.4th 345, 373, 106 Cal.Rptr.2d 93, 21 P.3d 769.) " '[O]therwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.' [Citation.]" (*Ibid.*) In any event, unless it is reasonably probable defendant would have

obtained a more favorable result absent the misconduct, the judgment may not be reversed. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133, 74 Cal.Rptr.2d 121, 954 P.2d 384.)

The first two instances of alleged misconduct arose when the prosecutor related an apparently true story to the jury about a girl who was sexually abused by her father and waited until she was 16 years old to tell anyone about it. Defendant objected and the court sustained the objection. Defendant did not, however, request the court to admonish the jury. Immediately thereafter, in stressing the general reluctance of adults to believe such abuse happens, the prosecutor commented, "And that's why when you watch Oprah you hear about these adults now who kept it quiet for years." Defendant's failure to object to this latter comment and his failure to request the court to admonish the jury as to the former comment precludes relief on appeal. There is no reason to believe that jurors would have disobeyed an instruction to disregard such comments had they been so admonished.

Defendant contends the very next comment by the prosecutor also constituted misconduct. The prosecutor told the jury, "The charges are conservative in this case for a reason. It is what the evidence proves in this case. It is not charged as to 40 to 50 times." Defendant objected to the prosecutor characterizing the evidence as conservative, and the court sustained the objection. Again, defendant failed to request the court to admonish the jury.

***8** But assuming the comment constituted misconduct, defendant was not prejudiced as a result. The comment related to Kristin's testimony that defendant had forced sexual intercourse with her once or twice a month beginning in the fourth grade and continuing until the sixth grade. The jury failed to reach a verdict on any of the counts relating

to the allegations that he used force or other such means to commit the lewd acts with Kristin.

We further note that the jury was instructed with CALJIC Nos. 1.01 (instructions to be considered as a whole) and 1.02 (statements of counsel not evidence). The jurors were instructed to apply the law as stated by the court, and we presume they properly followed the court's instructions. (*People v. Bonin* (1988) 46 Cal.3d 659, 699, 250 Cal.Rptr. 687, 758 P.2d 1217, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1, 72 Cal.Rptr.2d 656, 952 P.2d 673.) Any impropriety was cured by the standard admonition not to consider argument as evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 733-734, 122 Cal.Rptr.2d 545, 50 P.3d 332.)

Sufficiency of the Evidence Relating to Counts 1, 2, and 19

1. Counts 1 and 2

Defendant asserts the jury's failure to reach a verdict on counts 3 through 11 show the jury rejected Kristin's testimony that he used force to commit the lewd acts alleged in those counts. Thus, he contends, the guilty verdicts on counts 1 and 2, also involving Kristin, constitute "a compromise verdict, not based on reasonable, credible and solid evidence...." Not so.

"In assessing a sufficiency-of-evidence argument on appeal, we review the entire record in the light most favorable to the prevailing party to determine whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Wader* (1993) 5 Cal.4th 610, 640, 20 Cal.Rptr.2d 788, 854 P.2d 80.) And we do not reweigh the evidence or redetermine issues of credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, 26 Cal.Rptr.2d 23, 864 P.2d 103.)

There is ample evidence to support defendant's convictions on counts 1 and 2 based on those instances where Kristin stretched with defendant and when she gave him a massage. "[S]ection 288 is violated by 'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." (*People v. Martinez* (1995) 11 Cal.4th 434, 452, 45 Cal.Rptr.2d 905, 903 P.2d 1037.) It was undisputed physical touching occurred when defendant stretched with Kristin and when she gave him a massage. To convict him, the jury needed to find beyond a reasonable doubt the touching was sexually motivated. Such specific intent could reasonably be inferred from his possession of child pornography. (*People v. Memro, supra*, 11 Cal.4th at p. 865, 47 Cal.Rptr.2d 219, 905 P.2d 1305.)

2. Count 19

Defendant argues his conviction for possessing child pornography is based on insufficient evidence because Bennett, the FBI research specialist who testified that eight of the images were of actual children, was not trained in child physical development. The Attorney General contends whether the images were of actual children or not was an issue for the jury to determine.

***9** Bennett testified that she traced the eight images to publications predating the time when computerized morphing technology came into existence. Thus, her uncontradicted testimony established that the images were of actual children. She selected these particular images because she recognized them from images she had previously identified with the pre-1988 publications and because they were more explicit than some of the other images, in that, the girls appeared to have their legs apart.

A different witness, Detective Rowland, testified

that he was trained in regard to the Tanner scale involving the five stages of female development. According to Rowland, who viewed all of the images recovered from defendant's computer, the majority of girls depicted in the images ranged in age from 7 to 13 years. And the web site from which the images were downloaded proclaimed to depict girls between the ages of 7 and 17.

"In order to convict an individual of a violation of section 311 .11, the jury must be convinced beyond a reasonable doubt of the victim's minority status. Apparent age and actual appearance are simply forms of evidence allowable for proof of this fact." (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848, 106 Cal.Rptr.2d 150.) Here, there was ample evidence to permit the jury, as the finder of fact, to determine whether the girls depicted in the eight images recovered from defendant's computer, and tied to publications predating computer morphing technology, were under the age of 18.

Cumulative Error

Defendant argues we must reverse based on cumulative error. However, "[t]he 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' [Citation.]" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795, 118 Cal.Rptr.2d 668.) None of the errors complained of here resulted in prejudice to defendant, whether considered collectively or individually. In sum, "[d]efendant was entitled to a fair trial but not a perfect one. [Citations.]" (*People v. Cunningham, supra,* 25 Cal.4th at p. 1009, 108 Cal.Rptr.2d 291, 25 P.3d 519.)

Renewed Motion for Leave to File a Reply Brief

As to defendant's renewed motion for leave to file a reply brief, we note we previously denied his earlier motion for lack of good cause. The reply brief, due on June 25, 2004, was first received by the court on July 15. (Cal. Rules of Court, rule 33(c)(3).) In a

declaration supporting the renewed motion, defendant's appellate counsel explains she prepared the initial motion along with the reply brief on July 9.

Counsel fails to acknowledge the reply brief was due on June 25, 20 days after respondent's brief was filed. (Cal. Rules of Court, rule 33(c)(3).) Thus, counsel's explanation for completing and then attempting to file the belated brief on July 9 does not constitute good cause. (*Anderson v. Sherman* (1981) 125 Cal.App.3d 228, 238, 178 Cal.Rptr. 38 .) But we do not feel that defendant should be penalized for counsel's failure in this regard. Therefore, in the interest of justice, we grant the renewed motion for leave to file the reply brief.

DISPOSITION

***10** The judgment is affirmed. The renewed motion for leave to file a late reply brief is granted.

WE CONCUR: SILLS, P.J., and O'LEARY, J.

Cal.App. 4 Dist.,2004.

People v. Carpenter

2004 WL 2307417 (Cal.App. 4 Dist.) Not Officially Published, (Cal. Rules of Court, Rules 976, 977)

Certificate of Service

I , Petitioner's Counsel of Record, certify that on April 15, 2005 I served the
Petition for a Writ of Certiorari
on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope addressed as follows:

Office of the Attorney General
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Clerk, Court of Appeal
4th Appellate District Division 3
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Santa Ana, Ca 92701-3724 (additional copy fedexed December 4th, 2004)

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Executed on December 4th, 2004, at Studio City, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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